IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

J U D G M E N T

Dheera Ram Vs. State of Rajasthan
(1) D.B.CRIMINAL APPEAL NO.159/2001

Dheera Ram Vs. State of Rajasthan
(2) D.B.CRIMINAL JAIL APPEAL NO.83/2001

against the judgment dt.2.12.2000 passed by
Additional Sessions Judge, Bhinmal,
in Sessions Case No.89/1999.

Date of Judgment: Sept.13,2006

P R E S E N T

HON'BLE MR.JUSTICE N.N.MATHUR
HON'BLE MR.JUSTICE R.P.VYAS

Mr.Pradeep Shah, for appellant.
Mr.J.P.S.Choudhary, Public Prosecutor.

REPORTABLE BY THE COURT: **(PER HON'BLE MR.MATHUR J.)**

1. Appellant Dheera Ram was charged for having committed the offence of murder of his wife Mst.Pabu by pouring kerosene oil and setting her aflame. Learned Additional Sessions Judge Bhinmal, District Jalore, by judgment dated 2.12.2000 has convicted him of offence under Section 302 IPC and sentenced to imprisonment for

life and to pay a fine of Rs.100/- & in default of payment thereof, to further undergo three months' R.I. He has also been convicted of offence u/s.498A IPC and sentenced to three years' R.I. & to pay a fine of Rs.1000/- & in default of payment thereof, to further undergo three months' R.I.

2. The prosecution case as disclosed during trial is that daughter of PW 3 Peetha viz; Pabu resident of village Hariyali was married to appellant Dheera Ram resident of village Jherol about ten years prior to the date of occurrence. Out of their wedlock, two children were born namely PW 14 Ishwar aged 5 years and daughter viz; Mani. However, it is alleged that their relations were not cordial. There is specific allegation that she was subjected to cruelty for dowry by the appellant. Prior to the incident, a conciliation proceeding was also taken in the Gram Panchayat in the presence of PW 10 Avtaar Singh, Sarpanch, Haryali, wherein appellant promised to improve his conduct towards the deceased. On 25.4.1999, PW 3 Peetha submitted a written report Ex.P.7 at the Police Station, Jhab narrating the background as stated above. It was also stated that on 21st April, 1998, appellant visited his house and made a demand of Rs.1000/-. While leaving, he threatened to kill his daughter, in event of failure to meet his demand. He reported the matter to Sarpanch. He sent his nephew PW 1 Rana and PW 12 Uka to village Jherol to

inquire about the welfare of Mst.Pabu. On visiting Jherol, Rana and Uka came to know that appellant Dheera, PW 7 Chhoga, PW 4 Pancha and Bijla had taken Mst.Pabu to Palanpur for treatment. On receiving this information, he dispatched his nephew PW 2 Haru and PW 1 Rana to Palanpur. They came to know from appellant in the hospital that Mst.Pabu on her own, sustained burn injuries and, as such, she was under treatment. When they met Mst.Pabu, she wanted to give out something but the appellant did not allow her to speak. It was reported by the hospital staff that Mst.Pabu was burnt. On this information, the police registered a case for the offence u/ss.498A and 307 IPC. The police proceeded with investigation. PW 20 Dhanna Ram, A.S.I., Police Station, Jhab visited the Palanpur Hospital and recorded the statement of Mst.Pabu vide Ex.P.26 on 26.4.1999. On the same day, PW 17 Hathi Bhai, Executive Magistrate, Palanpur, also recorded her statement vide Ex.P.21. She breathed her last on 2.5.1999. The information was given at the Police Station, Palanpur. PW 21 Poonam Chand, Head Constable, visited the hospital. Necessary proceedings were taken. The information was also given to the concerned Police Station. The police added the offence u/s.302 IPC. Appellant was arrested on the same day. After usual investigation, the police laid chargesheet against the appellant for the offence u/s.302 IPC. Appellant denied the charges levelled against him and claimed trial.

The prosecution adduced oral and documentary evidence. Appellant in his statement under Section 313 CrPC denied the correctness of the prosecution evidence appearing against him. He stated that his wife was burnt in the accident while cooking food. He tried to save her and in that process, he also sustained injuries. She came to his place only about a month back from the date of occurrence. Prior to incident, she was living with her parents. He also stated that his children were living with his in-laws and they have given evidence against him at their instance. He pleaded innocence. He produced the injury report Ex.P.35 to show injuries on his person. However, he did not examine any witness in his defence. The trial Court having found the case proved against him, convicted & sentenced him in the manner noticed above.

3. Mr.Pradeep Shah learned counsel for the appellant at the outset has pointed out as to how the trial Judge has added the offence under Sec.302 IPC at the conclusion of trial by writing over the original charge. It is submitted that appellant was tried for the charge under Sec.304-B IPC and at the conclusion of trial, the manner in which he has added the charge under Section 302 IPC, has prejudiced the case of the appellant causing serious miscarriage of justice leading to vitiating the trial. The contention at first blush i.e. the statement of fact of writing 302 IPC over the

original charge is impressive. However, on careful scrutiny, we don't find substance in the contention. It appears that on 9.10.2000, learned Public Prosecutor submitted an application u/sec.216 of the Code of Criminal Procedure to add charge of offence u/s.302 IPC. The learned trial Court after hearing learned P.P. and the counsel for defence accepted the application. It further appears from the ordersheet dated 9.10.2000 that learned counsel desired to make a request to recall only PW 20 Dhana Ram and PW 21 Poonam Chand for cross examination. Learned P.P. expressed desire to re-examine PW 3 Peetha. All the three witnesses were recalled and their statements were recorded on 13.11.2000. Their statements were put to appellant under Section 313 CrPC on the same day.

4. Section 216 CrPC empowers the trial Court to add a new charge at any time before the judgment is pronounced. The procedure for trial with regard to addition or alteration of a charge is laid down in Section 216(3) and (4). The addition or alteration of the charge does not open up the trial from the beginning and the court may immediately proceed with the trial, if it is of the opinion that there will be no prejudice to the accused. If the defence or the prosecution expresses desire to re-examine the witness or to produce any other witness, such a permission should ordinarily be granted. Section 217 CrPC provides that when

a charge is altered or added, the court should recall any witness which the prosecution or the defence desires. But it is not obligatory on the court to recall a witness, if it is of the opinion that the witnesses are sought to be recalled for the purpose of vexation or delay or defeating the ends of justice. We also make it clear that when the trial court amends or adds a charge, it should not write over the original charge but should leave it on the file for reference, if necessary and should write the new charge separately and correctly dated. But if this procedure is not followed, this will not lead to vitiating the charge. In the instant case, the learned trial Judge adding the charge, has put his initials and also given the date. He has drawn the ordersheet and given the opportunity to the Public Prosecutor and the defence. Thus, no prejudice is caused to the appellant. We can only say that it would have been better, if instead of writing over the original charge, the trial Judge would have drawn the new charge on a separate sheet. Thus, the contention stands rejected being of no substance.

5. It is contended by the learned counsel that there is delay of four days in lodging the F.I.R. inasmuch as while the incident took place on 21.4.1999, the F.I.R. was lodged on 25.4.1999. Learned counsel has also criticized the dying declarations recorded by PW 20 Dhana Ram, A.S.I., vide Ex.P.26 and also PW 17 Hathi Bhai, Executive Magistrate

vide Ex.P.21. It is further submitted that the alleged witness of occurrence PW 14 Ishwar, son of deceased, minor aged 5 years, is not a trustworthy witness. Learned counsel has also criticized the testimony of other prosecution witnesses. Lastly, it is submitted that one of the important witness viz; Mst.Mani, daughter of deceased, has not been produced, as such, adverse inference against the prosecution be drawn.

6. In order to appreciate the contention, it would be appropriate to briefly survey the prosecution evidence. Before we proceed to deal with the prosecution evidence, it would be appropriate to refer-to medical evidence.

7. The Medical Board headed by Dr.B.B.Sutaria conducted the post mortem on the dead body of Mst.Pabu vide Ex.P.6 and in their opinion, the cause of death was septicaemic shock due to extensive burns over the body.

8. Dealing with the ocular evidence, PW 3 Peetha, father of deceased, deposed that his daughter deceased Pabu was married to appellant about ten years back. Whenever she used to visit the house, she used to narrate cruelty towards her on the part of appellant. The appellant used to make demand of ornaments and money. He also used to threaten to kill her in the event of not meeting the demand. About eight months prior to the date of occurrence, deceased Pabu

came to his house and reported that she was being assaulted by appellant, who also caused burn injuries. He took the matter to the Panchayat. Many people including Rana, Chhoga, Pancha, Bheema etc. were also present at the time of Panchayat. Appellant was also called in the Panchayat. He tendered apology and assured the Panchayat for not repeating such incident. On the death of elder brother of appellant, he sent Mst.Pabu to her in-laws. Sometime back, appellant visited his house and made a demand for Rs.1000/-. He also threatened that in the event of not making the payment, his daughter would be killed. Thereafter, he sent PW 1 Rana and PW 2 Haru to village Jherol to ensure that something untoward may not happen to Mst.Pabu. There, the son and daughter of Pabu told them that their mother was burnt by appellant after pouring kerosene on her. Rana and Haru returned to Haryali and reported the incident. He came to know that his daughter Mst.Pabu was taken to the hospital. He sent Rana and Haru to Palanpur. Initially, they were not allowed to see Mst.Pabu. He has also given the details of investigation. There is a lengthy cross examination but nothing substantial has been elicited to discredit the testimony of this witness.

9. P.W.1 Rana is the cousin brother of deceased Pabu, being uncle's son. His statement is almost on the line of PW 3 Peetha. He deposed that appellant used to harass &

torture his deceased sister Pabu and that he expressed his desire on various occasions to bring another wife. This fact was being reported by deceased Pabu to the family members as & when she visited the house. Eight to ten months prior to the date of occurrence, a "panchayat" was convened in village Jherol. In the "panchayat", appellant admitted his guilt and assured that in future, he would not harass and ill-treat Mst.Pabu. Thereafter, Mst.Pabu stayed at her in-laws house. He had gone to village Jherol to verify if she was being treated well. The children of Mst.Pabu viz; Mani and Ishwar informed that their mother was put to flames by pouring kerosene by appellant and she was removed to the hospital. He reported the matter to PW 3 Peetha. Thereafter, he went to Palanpur Hospital alongwith PW 2 Haru. They found Pabu admitted in the hospital. They were not allowed by appellant to meet Pabu. Thereafter, they returned to the village and informed PW 3 Peetha. On receiving this information, PW 3 Peetha submitted a written report at the Police Station. There is a lengthy cross examination but nothing substantial has been elicited to discredit the testimony of this witness.

10. PW 2 Haru is another cousin brother of deceased Pabu. The statement of this witness is almost on the line of PW 3 Peetha and PW 1 Rana. Nothing substantial has been brought-in to discredit the testimony of this witness.

11. PW 11 Kama is a labour of PW 3 Peetha. He deposed that deceased Pabu was married to appellant about ten years before the date of occurrence. Appellant used to harass and torture deceased Pabu. He came to know from PW 2 Haru and PW 7 Chhoga that Mst.Pabu was burnt by Dheera. She was admitted in the hospital at Palanpur. PW 12 Uka is the sister of deceased Pabu. His statement is almost on the line of PW 3 Peetha.

12. PW 10 Avtaar Singh is Sarpanch of village Hariyali. He deposed that deceased Pabu was married to appellant about ten years back. Whenever Mst.Pabu visited the village, she reported about the ill-treatment to her at the hands of her husband. About one and half years prior to the date of occurrence, attempt to burn Mst.Pabu was made by appellant. The incident was reported to him. Mst.Pabu had approached to him. He wrote a letter to the husband of Sarpanch, Jherol viz; Hem Singh, who had convened a meeting and summoned accused and his parents. The accused was given firing in the meeting. He confessed the guilt and assured the "panchayat" that in future, there would be no repetition of such mistake. He also stated that Pabu used to visit the village after marriage and make complaints about the ill-treatment by her husband and other members of his family.

13. The other witnesses viz; PW 4 Pancha, PW 5 Mahadeva, PW 6 Hema Ram, PW 7 Chhoga, PW 8 Herchand, PW 9 Mst.Thakri, PW 13 Mohabbat Singh and PW 16 Sanwla Ram have not supported the prosecution case and, as such, they were declared hostile.

14. Analyzing the evidence, we find that inspite of the fact that some of the witnesses have not supported the prosecution case and they have been declared hostile, there is consistent credible evidence that the appellant was married to deceased Pabu about ten years back and the cruel treatment meted out to deceased had continued until her death. It is significant that on earlier occasion, an attempt was made to kill her by burning. A "panchayat" was also convened wherein appellant tendered apology and assured of good treatment to her. Thus, there is the evidence of harassment and torture to deceased by appellant. We are of the view that the trial Court has rightly convicted the appellant of offence under Section 498A IPC.

15. The prosecution in order to establish the charge of murder has mainly relied on the dying declarations. The first oral dying declaration was recorded by PW 20 Dhana Ram, A.S.I., Police Station Jhab. He deposed that he was sent to Palanpur by the S.H.O., Police Station, Jhab on an F.I.R. being lodged by PW 3 Peetha. When he reached to the

hospital, on inquiry, he came to know that Peetha was admitted in the Burn Unit. He inquired from the duty doctor about the fitness of deceased Pabu to give a statement. The doctor certified that she was in a fit condition to give her statement. Accordingly, he recorded the statement of deceased Pabu vide Ex.P.26. She made a statement to the effect that her husband had poured kerosene on her and lit fire. She also disclosed that during the night of occurrence, Besra Meghwal visited their house, which was objected-to by her husband. She also stated that her husband had no liking for her, as such, he used to harass and torture her. At the time of occurrence, her daughter and son were also present. She put her thumb mark on the statement. In the cross examination, he admitted that Mst.Pabu gave statement in Rajasthani language. He also admitted that sometime before the Executive Magistrate had also recorded her statement. He denied the suggestion that Mst.Pabu had told him that she sustained burn injuries in an accident while preparing food.

16. Another dying declaration has been recorded by PW 17 Hathi Bhai, Executive Magistrate, Mamlatdaar Kachery, Palanpur, District Banaskanta. He deposed that the police made a request to him vide application Ex.P.20 for recording statement of Mst.Pabu. He visited the Civil Hospital, Palanpur, where Mst.Pabu was admitted in the Burn Unit. He

inquired about the fitness of Mst.Pabu for giving statement from PW 18 Dr.S.M.Advan, who gave him a certificate Ex.P.21 to the effect that she was in a fit condition to give statement. He recorded her statement vide Ex.P.21, wherein she stated that appellant poured kerosene on her and lit fire. Thereafter to extinguish the fire, he threw water on her. She also stated that appellant had no liking for him. She further stated that at the time of occurrence, her daughter and son were present.

17. PW 18 Dr.S.M.Advan deposed that on 26.4.1999, he was posted as Medical Officer, Civil Hospital, Palanpur. At about 5.30 PM, he was in the Emergency Ward. Deceased Pabu was admitted in the Burn Unit. The Executive Magistrate, Palanpur had visited for recording dying declaration of Mst.Pabu. At that time, he checked Mst.Pabu and found her physically & mentally fit to give statement. In that regard, he gave a medical certificate as to her fitness to give statement making an endorsement on dying declaration Ex.P.21. Nothing substantial has been elicited to discredit the testimony of this witness.

18. On careful consideration of the dying declarations, we do not find any reason to discredit them. There is nothing to suggest that it was the outcome of the tutoring. The dying declarations appear to be voluntary and she was in a fit

condition to give statement. Thus, we are of the view that the trial Court has rightly relied on both the dying declarations.

19. PW 14 Ishwar is the minor son of deceased Pabu. The trial Court before recording the statement of this witness, put certain questions to satisfy whether he had the understanding to give statement on oath. It was noticed by learned trial Judge that the witness was repeatedly made to understand the questions, put to him. He stated that his father Dheera poured kerosene on his mother and lit fire. In the cross examination, he admitted that he was staying with his maternal uncle. He also admitted that he was giving the statement as tutored by her maternal uncle. He also admitted that his maternal uncle had accompanied him in the court. On careful consideration of the statement, we are of the view that it is not safe to rely on the testimony of this witness.

20. It is lastly contended by the learned counsel that only independent eye witness Mani has not been produced. It may be stated that PW 14 Ishwar is a child of 5 years. He has not been able to give statement. Mani is younger sister of Ishwar. Thus, she must be about 3 to 4 years at the time of incident. Thus, no adverse inference can be drawn for non-production of Mani.

21. As far as the criticism of delay in filing the F.I.R. is concerned, we are of the view that there is no substance therein. It is ofcourse true that the alleged occurrence took place on 21.4.1999 but the F.I.R. was lodged as late as on 25th April, 1999. It may be stated that immediately after the occurrence, she was shifted to Palanpur for treatment. PW 3 Peetha stated that he sent PW 1 Rana and PW 2 Haru to village Jhab to inquire about the welfare of his daughter Pabu. PW 1 Rana and PW 2 Haru visited the village Jhab, where they came to know that Mst.Pabu was taken to the hospital at Palanpur. They returned to village Hariyali and reported the matter to PW 3 Peetha. Thereafter, Rana and Haru were despatched to Palanpur, where they came to know about the details of the incident. They returned from Palanpur to village Hariyali and narrated the incident to PW 3 Peetha. Only thereafter, the F.I.R. could be lodged. Thus, the delay in lodging the F.I.R. is not fatal to the prosecution case.

22. From the evidence discussed above, we find that the evidence of dying declarations is of clinching nature so as to fully establish involvement of appellant in the murder of his wife Mst.Pabu. The dying declarations find corroboration from the medical evidence and other incriminating circumstances.

23. Consequently, we find no merit in these appeals. Thus, both the appeals i.e. Regular Appeal as well as the Jail Appeal are dismissed. Appellant Dheera Ram is in jail. He will serve out the remaining part of the sentence.

(R.P.VYAS), J. **(N.N.MATHUR), J.**

RANKAWAT JK, PS